The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest. It may also be observed that section 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly expenses connected with the sale and then as follows: —

"(c) Thirdly, in the payment to the chargee of the *total amount due under the charge at the time of sale;*"

The words in italics, in my opinion, further indicate that interest continues to accrue at the agreed rate until sale. I would accordingly allow the chargees' appeal and direct that the order of court dated February 18, 1971 be amended to allow interest on the sum then due at the rate of 11 per cent per annum until the date of sale.

As regards the cross-appeal I must say, with respect, that there are no merits in the arguments put forward to detain us for more than a moment. First, the validity of the notice in Form 16D is no longer open to question since the decision of this court in *Mary Michael's* case.[3] In this connection it was further argued that the notice of default was not such a notice of demand as conformed with the express terms of the agreement between the parties as set out in clauses 1 and 3 of the charge. In my view the simple answer is to be found in clause 8 providing that in the events which happened "it shall be lawful for the chargee forthwith to give notice to the chargor under section 254 of the National Land Code etc."

Finally as regards the question of costs I need only add that, in clause 9(5), costs as taxed between solicitor and client had been expressly agreed to and the judge was perfectly entitled to make an order in terms. The cross-appeal is accordingly dismissed, but, having regard to all the circumstances, I think it will be sufficient that the appellants do have the costs of the appeal as taxed between party and party.

Gill and **Ali F.JJ.** concurred.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Messrs Skrine & Co.; Messrs Lim & Hoh.*

KARUPPIAH PILLAI v. KAKA SINGH

[A.C.J. (Suffian F.J.) December 10, 1971]

[Kuala Lumpur — Raub Civil Appeal No. 1 of 1970]

Moneylenders — Loan interest free to friend — Failure to comply with statutory requirements — No note or memorandum in writing — Whether contracts enforceable — Moneylenders Ordinance, 1951, s. 16(1).

The plaintiff (respondent in this case) was a moneylender. He lent money to his friend the defendant (appellant) on three separate occasions without interest. On each occasion he took a cheque from the defendant as security, and on no occasion was a note or memorandum in writing of the contract ever signed by the parties. When the defendant failed to repay him, the plaintiff sued him and the learned president allowed his claim. The defendant appealed.

Held, allowing the appeal: as each of these loans was a contract for the repayment by a borrower of money lent to him by a moneylender within the meaning of section 16(1), of the Moneylenders Ordinance, 1951, and as there was no note or memorandum in writing of the contract ever signed by the parties, none of these contracts could be enforced.

The following cases were cited in argument: *Leong Poh Chin* v. *Chin Thin Sin* [1959] M.L.J. 246 and *Nasib Singh* v. *Ramasamy* [1969] 1 M.L.J. 211.

CIVIL APPEAL.

E. V. Devadason for the appellant.

Balwant Singh for the respondent.

Suffian F.J.: The plaintiff (respondent) lent $1,700 to the defendant (appellant). The defendant did not pay, and so the plaintiff sued him. The plaintiff won, and the defendant has appealed to this court

The main ground of appeal has to do with subsection (1) of section 16 of the Moneylender's Ordinance No. 42 of 1951. The material part of that subsection provides —

"No contract for the repayment by a borrower .... of money lent to him ... by a moneylender ... after the commencement of this Ordinance ... and no security given by the borrower ... in respect of such contract, shall be enforceable unless a note or memorandum in writing of the contract ... be signed by the parties to the contract...."

The facts as found by the learned president were that the plaintiff was at the material time a licensed moneylender (he admitted it), that he lent money to the defendant on three separate occasions without interest, that on each occasion he took a cheque from the defendant as security, and that on no occasion was a note or memorandum in writing of the contract ever signed by the parties. The learned president nevertheless gave judgment for the plaintiff on the ground that each of the loans was a friendly loan. He rejected counsel for the defendant's argument that as the plaintiff was admittedly a moneylender the transactions were caught by subsection (1) of section 16 and, there being no written note or memorandum of the contracts signed by the parties, they were not enforceable.

The same argument was advanced before me by Mr. Devadason for the defendant, but neither counsel was able to produce any authority in support of or in opposition to this argument. During the course of the argument I asked this question: if the plaintiff had lent money interest free to his father or brother, could he not recover if in fact there was no written note or memorandum of the transaction? Mr. Devadason sub-

mitted not. This seemed to me a rather startling proposition, but after anxious consideration I have to conclude that he was right.

The answer to the question posed must be determined simply by reference to the language of subsection (1) of section 16. The operative words in it are "No contract for the repayment by a borrower of money lent to him by a moneylender". There is no doubt that each of these three transactions was a contract for the repayment by a borrower of money, the defendant clearly being a borrower. Was it also a contract for the repayment by a borrower of money lent to him by a *moneylender?* The word "moneylender" is defined by the Ordinance. Much stress was laid in the trial court on the fact that each of the loans was interest free. This was because, I think, of the presumption under section 3 which says that —

"any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender".

In the event the learned president found that, as the parties were in fact friends (they served on the committee of the M.I.C. branch at Bentong, the plaintiff being its President) and the loans were interest free and friendly loans, subsection (1) of section 16 did not apply.

With respect I do not agree with him. Section 3 only raises a presumption in the circumstances mentioned in it. It is still open for the defendant to prove by other means that the plaintiff was moneylender within the meaning of the Ordinance. Not every one who lends money is a moneylender. He must be a person who is in the business of moneylending, for section 2 of the Ordinance says that —

" 'moneylender' includes every person whose *business* is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that *business*..."

The section goes on to exclude certain categories of persons who lend money, from the definition.

I do not see how the court can hold that a person who is a licensed moneylender is not a person whose business is that of moneylending. What was the point of the plaintiff having a licence to lend money if he did not intend to carry on the business of moneylending? If the legislature had intended that a licensed moneylender may make an interest-free loan to friends without complying with subsection (1) of section 16, I think it would have included such a moneylender in the light of persons who are not by definition moneylenders.

Mr. Balwant Singh for the plaintiff argues that a licensed moneylender may give loans to friends "as incidentals" without having to comply with subsection (1) of section 16 as, it is said, that provision applies only if the object of the loans is to promote his moneylending business, and Mr. Balwant Singh refers me to page 6 of *Straton and Blackshaw* on Moneylenders where it is stated in a paragraph headed "incidental lending":

"Section 6(d) of the English Moneylenders Act excludes from the definition of a moneylender 'any person ... *bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money'. The lending of money, in order to comply with subsection, must not be the *primary* object of the business."

I do not think that Mr. Balwant Singh's argument can succeed. A person *bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money is also excluded from our definition of moneylenders, see paragraph (c) of the definition in section 2. But here there is no finding that the plaintiff was carrying on any business other than that of moneylending. Secondly, in my opinion a licensed moneylender who lends money interest free to friends must comply with subsection (1) of section 16 even if he carries on another business.

In my judgment, the plaintiff was a moneylender within the meaning of the Ordinance; each of these loans was a contract for the repayment by a borrower of money lent to him by a moneylender within the meaning of subsection (1) of section 16; and as there was no note or memorandum in writing of the contract signed by the parties, none of these contracts may be enforced.

I would therefore allow this appeal with costs.

Appeal allowed.

Solicitors: *Ernest V. Devadason; Singh Bros. & Co.*

LEE LUM SOH v. LOW NGAH

[A.C.J. (Mohamad Azmi J.) July 31, 1972]

[Kuala Lumpur — Civil Appeal No. 25 of 1971]

Landlord and Tenant — Lease for 10 years — Lease void for non-registration — Whether any equitable right in favour of tenant — Monthly tenancy — Notice — National Land Code, ss. 5 and 225(2).

The appellant appealed against the decision of the magistrate's court ordering him to give up vacant possession of certain premises to the landlord, the respondent. The appellant had entered into possession of the premises under a lease which was not registered under the National Land Code. The learned magistrate found that the agreement of lease was void and that the appellant was in occupation of the premises as a monthly tenant. The agreement had been duly terminated and as the appellant had failed to comply with the notice, he found that the appellant was wrongfully in possession.

Held: (1) as the lease in this case had not been registered, it was void;

(2) the appellant had failed to establish any equitable ground which would justify the court to order specific performance of the agreement;

(3) the learned magistrate was correct in holding that the appellant was a monthly tenant and that the respondent had effectually put an end to the tenancy and was therefore entitled to possession of the premises.

Cases referred to:-

(1) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] 1 K.B. 130.

(2) *Liew Ah Hock* v. *Malayan Railway* [1967] 1 M.L.J. 53 at page 55.

(3) *Lee Ah Low* v. *Cheong Lep Keen & Anor.* [1970] 1 M.L.J. 7 at page 8.

(4) *Tan Joo Kwang* v. *Chop Sin Hup Kiat* (1921), 14 S.S.L.R. 176.